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## Introduction

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# SYMPOSIUM: 2001-2002 SUPREME COURT REVIEW

## INTRODUCTION

### The Honorable Sven Erik Holmes\*

This is the eighth year that The University of Tulsa College of Law has sponsored this symposium on the United States Supreme Court. This annual review is an important event here at the law school—and one that I am proud to have been a part of since its inception.

The 2001 Term of the Supreme Court lacked any of the electricity of recent terms. Indeed, even its most celebrated opinion, *Zelman v. Simmons-Harris*,<sup>1</sup> which upheld an Ohio school voucher plan, can be viewed as a mechanistic application of the Court's previous Establishment Clause jurisprudence. Indeed, the case may be read as a simple declaration that the issue of school vouchers should be contested in the political, rather than judicial, arena.

While the cases themselves may not have been remarkable, the Court addressed an extraordinary range of issues, confirming once again that judicial opinions have a very real impact on the life of every American. For example, during the 2001 Term, the Court addressed pornography and Internet regulation in *Ashcroft v. Free Speech Coalition*<sup>2</sup> and *Ashcroft v. American Civil Liberties Union*;<sup>3</sup> altered the patent law doctrine of equivalence in *Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Company*;<sup>4</sup> overturned on First Amendment grounds a state prohibition on judicial candidates "announcing" their views on controversial topics in *Republican Party of Minnesota v. White*;<sup>5</sup> and decided its only federalism case in favor of the states, in predictable five-to-four fashion, in *Federal Maritime Commission v. South Carolina State Ports Authority*.<sup>6</sup>

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1. 122 S. Ct. 2460 (2002).
2. 122 S. Ct. 1389 (2002).
3. 122 S. Ct. 1700 (2002).
4. 122 S. Ct. 1831 (2002).
5. 122 S. Ct. 2528 (2002).
6. 122 S. Ct. 1864 (2002).

My remarks today will focus on decisions involving two subject matter areas of particular importance to a United States District Judge: employment law and capital punishment. These cases reinforce the proposition that the Supreme Court is concerned with matters both small and great: small (by comparison)—the ability of Congress to legislate proper workplace conditions for an individual worker—and great—society’s power under the Constitution to execute an individual citizen.

## I

Before turning to specific cases, permit me to present the 2001 Term by the numbers—which tell many stories. First, during the 2001 Term, the Supreme Court issued seventy-five opinions, compared with seventy-nine last year and seventy-three the year before. Thus, the Court has settled into an approximate maximum of eighty cases per year. Such a limit has immediate implications. At the beginning of the 2002 Term, the Court had accepted forty-eight cases. One can reasonably expect that, of all the cases and controversies from the appellate courts that are now ready for adjudication, no more than thirty additional cases will be accepted by the Supreme Court this year for resolution.

Second, seventy-five percent of the cases decided during the 2001 Term reversed or vacated in whole or in part a decision of a lower court. This fact underscores the principle that the Supreme Court, in discharging its responsibility to “say what the law is,” prefers the vehicle of reversal rather than that of affirmance. In this way, the Court is not even arguably bound by the language or reasoning of the lower court opinion, and can state the law without any such interference.

Third, Chief Justice Rehnquist wrote ten opinions, more than any other Justice. Not only does the Chief Justice dominate the Court substantively, he is actively involved in executing the jurisprudence of the Rehnquist Court.

Fourth, the number of unanimous decisions reached its lowest point in the last ten years: twenty-seven. By comparison, thirty-nine cases were decided unanimously in the 2000 Term.

Fifth, the numbers suggest to many Supreme Court watchers that Justice Kennedy is actively seeking to succeed Chief Justice Rehnquist, in the event the Chief Justice decides to step aside at the end of this Term. Short of openly campaigning for the position, the most demonstrative act by which to advance oneself for the position of Chief Justice is to express your agreement with the current Chief Justice whenever possible. The numbers reflect that Chief Justice Rehnquist agreed with Justice Kennedy in more cases than with any other Justice on the Court, eighty-four percent. By contrast, Chief Justice Rehnquist agreed with Justice Stevens in the least number of cases, fifty-five percent.

Sixth, the Court split five-to-four in twenty-one cases, or twenty-eight percent of the total. Of these splits, Justice O’Connor voted with the majority in seventeen cases. Thus, Justice O’Connor continues to exercise enormous

influence on the Court, acting as the swing vote in an overwhelming majority of the Court's most divisive opinions.

Finally, consistent with the numbers, members of the Rehnquist Court increasingly appear to have assumed settled roles in dealing with contested issues. This should come as no surprise. October 7, 2002, marked the beginning of the ninth consecutive Term without any turnover in Court membership. Indeed, August 3, 1994, the date Justice Breyer took the oath of office, until today is the longest period without change on the Court since the period between the arrival of Justice Joseph Story in 1812 and the subsequent arrival of Justice Smith Thompson in 1823. Linda Greenhouse, the Pulitzer Prize winning journalist for the New York Times, has examined these facts in light of the sociology of organizational behavior.<sup>7</sup> It merits consideration whether, as a result, the Court's opinions reflect predictability and the acceptance of established roles, responsibilities, and views, and whether this phenomenon has contributed to the fact that the jurisprudence of the Rehnquist Court has become more entrenched with each passing year.

## II

Since coming on the bench in 1995, nearly one-third of all the civil trials I have conducted involved some area of employment law, including Title VII of the Civil Rights Act ("Title VII"),<sup>8</sup> the Americans with Disabilities Act ("ADA"),<sup>9</sup> the Age Discrimination in Employment Act ("ADEA"),<sup>10</sup> and the Family and Medical Leave Act ("FMLA").<sup>11</sup> Such disputes are a staple of the federal judicial docket. The volume of cases in this area has created a demand for involvement by the Supreme Court—and the Court has responded.

The 2001 Term was remarkable for its number of employment law decisions. The Term was even more remarkable because, almost without exception, the Court sided with employers on substantive issues, and sided with employees on procedural issues. All of these cases will have an immediate and substantial impact on the caseload of every United States District Judge.

First, I will address the substantive cases. In *Barnes v. Gorman*,<sup>12</sup> the Court held that punitive damages may not be awarded in private suits brought under Section 202 of the ADA and Section 504 of the Rehabilitation Act.<sup>13</sup> This case not only limits the potential exposure of offending employers, but also the opinion's reliance on contract law analysis<sup>14</sup> foretells the possibility that the Court will

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7. Northwestern Law News, *The Court: Same Time Next Year. And Next Year* <[http://www.law.northwestern.edu/depts/communicate/newspages/article\\_full.cfm?eventid=324&pagetype='current'](http://www.law.northwestern.edu/depts/communicate/newspages/article_full.cfm?eventid=324&pagetype='current')> (accessed Nov. 18, 2002).

8. 42 U.S.C. § 2000e-5 (2000).

9. 42 U.S.C. §§ 12101-12213 (2000).

10. 29 U.S.C. §§ 621-634 (2000).

11. 29 U.S.C. § 2601-2654 (2000).

12. 122 S. Ct. 2097 (2002).

13. *Id.* at 2103.

14. *See id.* at 2100-03.

utilize this approach to invade further the province of the legislative branch in connection with statutory construction. In addition, the opinion declares the view, without legal analysis or authority, that punitive damages “are . . . not embraced” within the general rule that “where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>15</sup>

In *Chevron U.S.A., Inc. v. Echazabal*,<sup>16</sup> the Court upheld an Equal Employment Opportunity Commission (“EEOC”) regulation permitting the defense to an ADA claim that a worker’s disability on the job would pose a direct threat to that worker’s health.<sup>17</sup> This seemingly narrow case may have broad ramifications since the corollary, which is present in many cases, is that the employer is capable of deciding what is good for, and therefore protects, the employee.

In *U.S. Airways v. Barnett*,<sup>18</sup> the Court held that an “accommodation” under the ADA that conflicts with a workplace seniority rule is not, absent evidence of special circumstances, “reasonable.”<sup>19</sup> This effectively reduces the extent to which employers must go to accommodate employees with disabilities.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>20</sup> the Court rejected a Sixth Circuit determination under the ADA that, in order to prove a substantial limitation in the major life activity of performing manual tasks, a plaintiff must show only that her manual disability involved a “class” of manual activities, and that those activities affect the ability to perform tasks at work.<sup>21</sup> The Supreme Court, in construing the term “substantially limits,” stated: “[S]ubstantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree.’ The word ‘substantial’ thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.”<sup>22</sup>

The Supreme Court also interpreted the term “major life activities”: “‘Major’ in the phrase ‘major life activities’ means important. ‘Major life activities’ thus refers to those activities that are of central importance to daily life. In order for performing manual tasks to fit into this category . . . the manual tasks in question must be central to daily life.”<sup>23</sup>

Thus, the Court concluded: “[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most

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15. *Id.* at 2102-03 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

16. 122 S. Ct. 2045 (2002).

17. *Id.* at 2053.

18. 122 S. Ct. 1516 (2002).

19. *Id.* at 1523-24.

20. 122 S. Ct. 681 (2002).

21. *Id.* at 692.

22. *Id.* at 691 (citation omitted).

23. *Id.* (citation omitted).

people's daily lives."<sup>24</sup> There is simply no understating the impact this opinion will have on future cases under the ADA.

In *Ragsdale v. Wolverine World Wide, Inc.*,<sup>25</sup> the Court overturned a Labor Department regulation under the FMLA that counted only that leave which was granted by the employer *after* the employer had designated such leave as FMLA leave.<sup>26</sup>

As noted, in the four cases decided this Term involving procedural issues, the Court generally sided with employees. In *Equal Employment Opportunity Commission v. Waffle House, Inc.*,<sup>27</sup> the Court held that an agreement between an employer and an employee to arbitrate employment-related disputes did not bar the EEOC from pursuing victim-specific relief, such as backpay, reinstatement, and damages, in an ADA enforcement action.<sup>28</sup>

In *Swierkiewicz v. Sorema N.A.*,<sup>29</sup> the Court held that an employment discrimination complaint need not contain specific facts establishing a *prima facie* case under the *McDonnell Douglas* framework, but instead must only satisfy the requirements of notice pleading.<sup>30</sup> The Court stated that the *McDonnell Douglas* framework is an evidentiary standard, not a pleading requirement.<sup>31</sup>

In *Edelman v. Lynchburg College*,<sup>32</sup> the Court upheld the EEOC's relation-back provisions of a "charge" rule pursuant to Title VII, thus permitting an otherwise timely filer to verify a discrimination charge after the time for filing has expired.<sup>33</sup>

In *National Railroad Passenger Corporation v. Morgan*,<sup>34</sup> the Court held that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his or her charge in the appropriate 180 or 300-day period,<sup>35</sup> but a plaintiff alleging a hostile work environment will not be time-barred if all acts constituting the claim are part of the same unlawful practice, and at least one act falls within the filing period.<sup>36</sup>

Based on these cases, the Court's guiding principle with respect to the federal employment laws is now quite clear: employees should have easy access to make a claim under the federal anti-discrimination statutes, but the relief that is available to an individual employee under these laws will be very limited. It is debatable whether Congress intended such a restrictive construction of these statutes, which were enacted specifically to help employees.

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24. *Id.*

25. 122 S. Ct. 1155 (2002).

26. *Id.* at 1162.

27. 122 S. Ct. 754 (2002).

28. *Id.* at 765.

29. 122 S. Ct. 992 (2002).

30. *Id.* at 999.

31. *Id.* at 997.

32. 122 S. Ct. 1145.

33. *Id.* at 1152.

34. 122 S. Ct. 2061.

35. *Id.* at 2077.

36. *Id.*

## III

There is no more significant an issue than whether society may execute one of its members—and, if so, under what circumstances. How society deals with this issue speaks volumes about our system of justice—and, thus, directly affects public confidence in the rule of law.

Since 1976, two separate and distinct developments have seriously threatened public confidence in capital punishment—and, in turn, public confidence in our legal system. The first is the reality of extensive procedural delays, resulting in an average of between eleven and twelve years from the imposition of a death sentence until execution.<sup>37</sup> The fact that, each year, many more people are sentenced to death than are executed convinced Congress that, without legislative action, there would be no end to such delays. The fact that society would impose a sentence of death, and then not carry it out, precipitated a crisis of public confidence in our legal system. The rule of law simply cannot survive if society does not enforce its commands.

Congress responded by enacting legislation aimed at ending unnecessary delays through new procedures governing judicial review in death penalty cases.<sup>38</sup> The goal of this legislation was to remedy the procedural problems that cause delay, and the denial of justice that attends unlimited appeals.

More recently, a second development has undermined public confidence in the death penalty. With the advancement of DNA technology, society is far better able to evaluate biological evidence to determine accurately actual guilt or innocence. This has precipitated a crisis of an entirely different nature. As of October 1, 2002, some 111 individuals originally sentenced to death have been released as a result of compelling forensic evidence of actual innocence.<sup>39</sup> In Illinois alone, DNA evidence established that thirteen individuals on death row were in fact innocent of the crime charged.<sup>40</sup> As a result, the governor has suspended further executions until adequate safeguards can be put in place.<sup>41</sup> And, in early October 2002, the state began an extraordinary case-by-case review of the case of every prisoner on death row. One possible outcome of such review is that the governor will grant blanket clemency to even the most heinous of criminals, with respect to whom actual innocence may not be an issue.<sup>42</sup>

These two developments have now come together in an extraordinary way. On the one hand, society has the desire to accelerate the process by ending unlimited appeals; on the other hand, society has reason to believe that there are factually innocent individuals among those condemned to die. Thus, the macabre

37. *Foster v. Fla.*, 123 S. Ct. 470, 471 (2002).

38. See 28 U.S.C. § 2254(d) (2000) (limiting federal court review of state convictions).

39. The Innocence Project, *DNA News* <<http://www.innocenceproject.org/dnanews/index.php>> (accessed Nov. 18, 2002).

40. Russ Feingold & Jon Corzine, *Halt Executions—Across the Nation* <<http://www.truthinjustice.org/natl-moratorium.htm>> (accessed May 16, 2002).

41. *Id.*

42. Kevin McDermott, *Illinois Tackles Task of Reviewing Nearly Every Death Sentence; Panel Will Make Recommendations on Clemency to Governor*, St. Louis Post-Dispatch A1 (Oct. 13, 2002).

scenario is that society is actually accelerating the execution of individuals who may be innocent.

In this context, during the last year, both Justice O'Connor and Justice Ginsberg made extra-judicial statements suggesting that the death penalty system suffered from serious deficiencies.<sup>43</sup> Such extra-judicial statements created high expectations that the Court was prepared to embark on a new course in death penalty jurisprudence.

The cases, however, indicate that the Supreme Court has not met these expectations and, in fact, has fortified its position. The Court provided powerful evidence in support of this conclusion by its decision, at the opening of the 2002 Term, not to take two cases: *Foster v. Florida*,<sup>44</sup> presenting the question of whether it is cruel and unusual punishment for a person to be on death row for more than twenty-seven years; and *In re Kevin Nigel Stanford*,<sup>45</sup> presenting the question of whether the Constitution prohibits the application of the death penalty to juvenile offenders.

Despite these decisions, the forces surrounding the death penalty appear to be having some effect. The fact that the Court took up three death penalty cases during the 2001 Term, and decided all three in favor of the defendant, suggests that there may be at least a subtle shift under way.

In *Atkins v. Virginia*,<sup>46</sup> the Court determined that it was constitutionally impermissible to execute mentally retarded defendants.<sup>47</sup> This issue has precipitated heated public debate since 1989 when, in *Penry v. Lynaugh*,<sup>48</sup> the Court held that there was no constitutional prohibition on such executions.<sup>49</sup> The Court noted that, since *Penry*, there have been several developments that would give rise to a change in the Court's view.<sup>50</sup> Such developments, of course, are primarily the public's questioning of the death penalty.<sup>51</sup>

In *Ring v. Arizona*,<sup>52</sup> the Court overturned the death penalty system in Arizona, which allocated a portion of the fact-finding responsibility in the penalty phase to the judge.<sup>53</sup> Other states with the same system include Alabama,<sup>54</sup> Colorado,<sup>55</sup> Delaware,<sup>56</sup> Florida,<sup>57</sup> Idaho,<sup>58</sup> Indiana,<sup>59</sup> Montana,<sup>60</sup> and Nebraska.<sup>61</sup>

43. *O'Connor Questions Death Penalty*, N.Y. Times A9 (July 4, 2001); Elisabeth Semel, *Con: The Death Penalty; A Capital Idea? Exonerations Prove System Isn't Perfect*, Daily News of L.A. V1 (Apr. 22, 2001).

44. 810 So.2d 910 (Fla. 2002), *cert. denied*, 123 S. Ct. 470 (2002).

45. 266 F.3d 442 (6th Cir. 2001), *habeas corpus denied*, 123 S. Ct. 472 (2002).

46. 122 S. Ct. 2242 (2002).

47. *Id.* at 2252.

48. 492 U.S. 302 (1989).

49. *Id.* at 340.

50. *Akins*, 122 S. Ct. at 2248-49.

51. *Id.*

52. 122 S. Ct. 2428 (2002).

53. *Id.* at 2443.

54. Ala. Code §§ 13A-5-46, 13A-5-47 (1994).

55. Colo. Rev. Stat. § 16-11-103 (repealed 2002).

56. Del. Code Ann. tit. 11 § 4209 (repealed 2002).

57. Fla. Stat. Ann. § 921.141 (West 2001).



In *Ring*, the Court held that any system in which the judge makes findings of fact at the sentencing stage regarding whether aggravating circumstances exist fails under the Sixth Amendment requirement that only a jury render such findings. The Court determined that this case was a logical extension of *Apprendi v. New Jersey*,<sup>62</sup> and that the 1990 decision upholding the Arizona system, *Walton v. Arizona*,<sup>63</sup> must be overturned.

Finally, in *Kelly v. South Carolina*,<sup>64</sup> the Court continued its long-running dispute with the South Carolina Supreme Court over jury instructions regarding the meaning of the term “life without parole.”<sup>65</sup> In *Kelly*, the Court concluded that capital jurors must be informed that “life without parole” truly means the defendant will never be released from prison.<sup>66</sup> It is widely believed that this instruction will result in fewer sentences of death.

The language in almost every decision of the Supreme Court involving the death penalty is heated—bordering on vitriolic. This is true for the three 2001 Term cases, and even more so for *In re Kevin Nigel Stanford* and *Foster v. Florida* in 2002. The death penalty is an issue about which tempers run high because it involves deeply felt moral and philosophical beliefs.

Although the views of the individual Justices are entrenched, and the intensity of those views is reflected in the opinions, this does not mean that the Court can avoid addressing capital punishment issues. To the contrary, the public will not tolerate a system that threatens public confidence in the rule of law. The paramount responsibility of the Supreme Court Justices, and every judge in the United States, is to promote public confidence in our legal system. With respect to capital punishment, this responsibility mandates that solutions be found to systemic problems, including the development of adequate safeguards to ensure that individuals who may be factually innocent are not put to death. The death penalty goes to the very heart of confidence in our legal system. If the present problems with death sentences are not remedied, confidence in the law in all areas will suffer irreparable harm. Accordingly, despite its reluctance, and despite the intensity of views of the individual Justices on both sides of the issue, the Supreme Court has no choice but to keep revisiting death penalty cases. Simply stated, that is the Court’s responsibility to our system of law.

I believe today’s program, as always, will be very interesting. Again, I congratulate the University of Tulsa College of Law for its continued good work in the study of the Supreme Court.

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58. Idaho Code § 19-2515 (Supp. 2002).

59. Ind. Code Ann. § 35-50-2-9 (Supp. 2001).

60. Mont. Code Ann. § 46-18-301 (2001).

61. Neb. Rev. Stat. § 29-2520 (1995).

62. 530 U.S. 566 (2000).

63. 497 U.S. 639 (1990).

64. 122 S. Ct. 726 (2002).

65. This dispute commenced in 1994 in *Simmons v. South Carolina*, 512 U.S. 154 (1994) and continued in 2000 in *Shafer v. South Carolina*, 532 U.S. 36 (2000).

66. *Kelly*, 122 S. Ct. at 733.